No. 05-83

THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

Petitioner,

v.

ARTURO R. RECUENCO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In Sullivan v. Louisiana, 508 U.S. 275 (1993) this Court concluded the denial of a jury verdict based on proof beyond a reasonable doubt is structural error which always requires the conviction be reversed. The Washington Supreme Court concluded the trial court's entry of a conviction of a greater crime than that found by the jury is not the product of a jury verdict based on proof beyond a reasonable doubt and thus pursuant to Sullivan concluded the error automatically required reversal. Should this court grant the State of Washington's petition for writ of certiorari?

2. Factual findings which increase the statutory maximum penalty are elements of enhanced or greater offenses. The Double Jeopardy provisions of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, bar the entry of a judgment notwithstanding the verdict in favor of the government in a criminal case. Does the Double Jeopardy clause also bar a reviewing court from concluding an error in entering a judgment on a greater offense then reflected in the jury verdict alone is harmless?

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Arturo Recuenco respectfully requests this Court deny the State of Washington's petition for a writ of certiorari to review the opinion of the Washington Supreme Court.

JURISDICTION

The Washington Supreme Court entered its decision on April 14, 2005. State v. Recuenco, 154 Wn.2d 156 (2005). The petition was filed on July 14, 2005. The jurisdiction of the Court was invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The State of Washington's petition for writ of certiorari properly notes that this case implicates the Fifth and Fourteenth Amendments to the United States Supreme Court. However, the State of Washington's petition in its statement of Constitutional Provisions Involved fails to note that the Sixth Amendment is involved as well.

STATEMENT OF THE CASE

Wash. Rev. Code §9.94A.533(4)[1] sets forth the length of additional confinement to which a trial court must impose where there has been an allegation and special jury finding that a defendant was armed with a deadly weapon in the commission of a crime. Wash. Rev. Code §9.94A.602, requires a special allegation that a person is armed with a deadly weapon, and a jury finding of that fact. That statute also defines a deadly weapon to include any firearm. Wash Rev Code §9.94A.602. With respect to the crime of second degree assault, a Class B felony, Wash. Rev. Code §9.94A.533(4)(b) provides for a mandatory additional term of 12 months confinement if the jury returns a deadly weapon special verdict.

[1] The statutes at issue have been recodified since the time of Mr. Recuenco's offense. For ease of reference, and because the recodified statutes did not effect any substantive changes, Mr. Recuenco will cite to the current statutes.

Wash Rev. Code §9.94A.533(3) provides for the imposition of a greater term of confinement where the jury finds the defendant committed the offense with a firearm. A firearm finding for Class B felony requires the imposition of an additional 36 months confinement.

In its petition, the State of Washington erroneously cites to Wash. Rev. Code §9.94A.510 instead of Wash. Rev. Code §9.94A.533. See e.g. Petition at 2.

The charging document in this case charged Mr. Recuenco with second degree assault with the additional allegation he was armed with a deadly weapon. Recuenco, 154 Wn.2d at 158. The jury returned a special verdict finding Mr. Recuenco was armed with a deadly weapon during the commission of the second degree assault. Id. The jury was not asked and did not return a special verdict concluding Mr. Recuenco was armed with a firearm. Id. at 160.

In its statement of the case the State incorrectly asserts "[t]here was no evidence of any other weapon in the assault." Petition at 2. However, the evidence established that during the course of the incident Mr. Recuenco wielded a metal pipe. Petition at 10a. Pursuant to Wash. Rev Code § 9.94A.602, "any metal pipe or bar used or intended to be used as a club" is a deadly weapon.

At sentencing, Mr. Recuenco argued the court could only impose the additional time permitted by the jury's deadly weapon. Recuenco, 154 Wn.2d at 160. Concluding that the evidence established Mr. Recuenco was armed with a firearm, the trial court concluded it had no discretion but to impose an additional 36 month firearm enhancement instead of the 12 months permitted by deadly weapon allegation and jury finding. Id.

Mr. Recuenco appealed the judgment in his case relying on this Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) to argue his Sixth and Fourteenth Amendment rights to a jury finding beyond a reasonable doubt of each element of the offnese were violated where the trial court imposed an additional term based upon its rather than the jury's finding that Mr. Recuenco was armed with a firearm. After, the Washington Court of Appeals affirmed the judgment, and while Mr. Recuenco's petition for review was pending in the Washington Supreme Court, this Court issued its decision in Blakely v. Washington, 542 U.S. 296 (2005).

After the Washington Supreme Court accepted review, the State of Washington conceded the trial court's finding was contrary to Blakely and Apprendi and violated Mr. Recuenco's right to jury finding beyond a reasonable doubt. Recuenco, 154 Wn.2d at 162-63. The State argued, however, that any error was harmless contending the evidence plainly established Mr. Recuenco was armed with a handgun.

Mr. Recuenco argued first that because under Blakely the determination that a person was armed with either a deadly weapon or a firearm elevates the punishment to which he or she is exposed, each finding is an element of an aggravated version of the substantive offense they arise from. Mr. Recuenco argued there is a continuum of three relevant degrees or levels of offenses: second degree assault; second degree assault with a deadly weapon finding; and second degree assault with a firearm finding. Mr. Recuenco contends that any judicial finding which increases the crime of conviction along that continuum, beyond that permitted by the jury verdict, not only violates the Sixth and Fourteenth Amendments, it also violates the Fifth Amendment's Double

Jeopardy Clause, as it constitutes a judgment notwithstanding the verdict. Mr. Recuenco also argued that because such a finding was not made by jury beyond a reasonable doubt, Sullivan did not permit a reviewing court to find that the error was harmless. In addition, Mr. Recuenco argued an independent analysis of the jury trial guarantees of the Washington Constitution precluded application of a harmless error analysis.

The Washington Supreme Court concluded that harmless error analysis could not apply because to do so would be to speculate on the absence of jury findings. Recuenco, 154 Wn.2d at 164) (citing, State v. Hughes, 154 Wn.2d 118, 144-45 (2005) (finding Sullivan analogous to situation presented where judicial as opposed to jury findings are used to increase a defendant's sentence based on less than proof beyond a reasonable doubt). Moreover, the Washington Supreme Court in both Hughes and Recuenco concluded that because there was no statutory mechanism in place to permit the imposition of the aggravated sentences, and because the court was not free to graft such a mechanism onto the statute, the only option left to the court was to remand the matters for sentences consistent with the jury's verdict. See, Recuenco, 154 Wn.2d at 164 (citing Hughes, 154 Wn.2d at 151-52).

Because it rested its decision on its analysis in Hughes, the Washington Supreme Court did not address Mr. Recuenco's additional argument that Double Jeopardy also barred application of a harmless error analysis. Recuenco, 110 P.3d at 192 n.3. Nor did the court address Mr. Recuenco's argument that application of the jury trial guarantees of the Washington Constitution precluded application of a harmless error analysis.

Mr. Recuenco has completed his term of confinement in this matter including that required by the judicially made firearm finding.

REASONS FOR DENYING THE PETITION

A. This case does not present any federal question upon which courts are divided.

1. This case does not present the question of whether a *Apprendi* error can be harmless because the trial court erred even more fundamentally by entering a judgment notwithstanding the verdict.

While Washington law provides for an additional term for a deadly weapon finding and a longer term based upon a firearm, Wash. Rev Code §9.94A.602 provides that a firearm is a deadly weapon for purposes of the deadly weapon enhancement. Moreover, the jury was expressly instructed this was so. Because a firearm supports both a deadly weapon finding and firearm finding, the deadly weapon finding is in effect a lesser included finding of a firearm finding.

The jury instructions set forth each element of the offense the State of Washington alleged Mr. Recuenco had committed – second-degree assault with a deadly weapon. The verdict the jury returned was complete with respect to every element of the offense charged and was based upon the proper standard of proof. Certainly the state could have asked the jury to return a more serious finding that Mr. Recuenco was armed with a firearm as opposed to merely a deadly weapon, but the state did not. The state elected to pursue the lesser finding and was successful in that endeavor.

But despite this complete verdict, the trial court concluded that a greater finding was necessary. There is no statutory provision legislative directive that required the

court to do so, rather this procedure is solely the product of caselaw. See Recuenco, 154 Wn.2d at 162 n.2. In doing so the court necessarily is making its own determination as to proper verdict encroaching upon the province of the jury by placing its judgment ahead of the jury's.

Cases like Blakely and Apprendi, by contrast, do not involve the same judicial disregard of the jury's verdict. Instead, in Apprendi, for example, a jury was not asked to make any finding as to the motivation for the crime much less whether it was racially motivated, nor did Mr. Apprendi make a stipulation as to motivation in his guilty plea. In making, the racial motivation finding the trial court, while going beyond that permitted by the either jury verdict or guilty, was not in any way suggesting the insufficiency of a jury's verdict returned or placing its judgment ahead of the jury's. And in both Apprendi and Blakely, the findings were statutorily authorized, as opposed to the sort of judicially driven encroachment present here.

By setting aside the jury's verdict in this case, a scenario not present in either Blakely or Apprendi, the trial court case engaged in distinctly different and fundamentally more problematic practice than in those two cases. Thus, this case does not properly present the question of whether Apprendi error in a simpler form may be deemed harmless.

2. Even if this case presented the question of whether *Apprendi* error can be harmless, there is no federal conflict on that issue because the two state courts which have deemed *Apprendi* errors structural did so substantially for law reasons.

The State of Washington claims the decision in Recuenco and Hughes, as well as the decision of the North Carolina Supreme Court in State v. Allen, _ S.E..2d

(N.C.) (2005 Lexis 695) holding harmless error analysis cannot apply are in conflict with decisions of several other state courts. Petition at 13-16. But this "conflict" is as much if not more about differences in state sentencing law than about a conflict in interpreting this Court's precedent.

Recuenco concluded the error

> was neither harmless nor invited. We reverse the Court of Appeals and vacate Recuenco's sentence. Because we held in Hughes that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury special verdict.

Recuenco, 154 Wn.2d at 164 (footnote omitted) (citing Hughes, 154 Wn.2d 118). In Hughes the court concluded there was no statutory sentencing scheme in place which permitted the submission of a aggravating factors to a jury. 154 Wn.2d at 149. Moreover, the Court concluded the creation of such a procedure was for the legislature and not the courts. Id. Thus, because no statute permitted a jury to have made the findings necessary to support the aggravating factors in that case, the Hughes court concluded it could not do so.

The North Carolina Supreme Court reached the same conclusion in Allen, stating "[a]lthough this Court might envision measures which could cure the constitutional defect in [the relevant statute] we are in agreement that the choice of remedy is properly within the province of the General Assembly." 2005 Lexis 695, 50-51.

Each of these decisions rests in large measure on the conclusion of state courts that correction of the relevant statutory schemes lies with the legislative branches in those states as opposed to the judiciary. The resolution of the highest courts of these states of the proper balance of authority among the branches of government in their

states does not create a conflict with courts of other states which have not employed such restraint.

B. The question presented implicates an extremely small, and ever dwindling, number of cases.

The State of Washington argues it is necessary for this Court to resolve the question of the applicability of harmless error to Apprendi error as the issue has far-ranging impact. Petitioner greatly exaggerates the impact any decision would have in either federal courts or in the various states.

In United States v. Booker, this Court substantially limited the number of cases which present a Blakely argument on direct appeal. 125 S. Ct. 738 (2005). Booker necessarily has substantially limited the number of cases which will ever address the question of harmless error on direct appeal in federal court. The question presented in this case will almost never come up with respect to the federal sentencing guidelines because almost no defendants raised Apprendi challenges before Booker, and Booker requires unpreserved claims be reviewed under the plain error doctrine.

In the State of Washington itself, new legislation was enacted effective April 18, 2005, providing procedures for alleging and proving to a jury facts which a trial court may rely upon to impose an aggravated sentence. App. A1-10 (ch. 68 Laws 2005 §§1-7 amending Wash. Rev. Code §9.94A.530 and Wash. Rev. Code §9.94A.535, and adding new section to Wash Rev. Code ch.9.94A). Pursuant to this act, all aggravated sentences for offenses committed after April 18, 2005 will be based upon facts proved to a beyond a reasonable doubt to a jury. Further, the Washington Supreme Court has ruled Blakely is not retroactive to cases which were final prior Blakely. State v. Evans,

Wn.2d _ (2005 Lexis 541). Even in Washington, at best any decision by this Court will apply only to that small class of cases which arose after Blakely was decided in June 2004, but before enactment of the new legislation. But even that small class may shrink to the point of disappearing, as the State of Washington has begun arguing the new legislation applies even in the case of offenses committed prior to its enactment. If this is the case, any decision by this Court in this matter will effect no one in Washington other than Mr. Recuenco, and because Mr. Recuenco has completed his sentence in this matter even its impact on his case will be minimal.

What has occurred in Washington can reasonably be expected to occur in other states as well, as legislature's correct the varied sentencing statutes to reflect this Court's decision in Blakely, cases requiring a determination of whether an error was a harmless will steadily disappear. See Allen, 2005 Lexis 695, 50-51 (concluding that question of how to correct sentencing procedure which violated Blakely is a matter for the North Carolina General Assembly).

> Unless, the State of Washington is contending that the issue in this case is important because it and other prosecutorial authorities intend to continue to seek the imposition of sentences which violate Apprendi and Blakely, the importance of the issues presented here will be short lived. At best the State of Washington's argument is nothing more than an effort to correct what it perceives to be an erroneous ruling by the Washington Supreme Court, which stands in the way of the State's effort to save a finite and ever decreasing group of wrongful judgments. There is no reason to grant a writ of certiorari in such a case.

C. The Washington Supreme Court's decision on the facts of this case is correct.

1. The State's argument is premised on the incorrect assertion that neither the deadly weapon nor firearm findings are elements of an offense.

As it did in Blakely, the State of Washington maintains that facts which increase the maximum sentence to which a defendant is exposed are not in fact elements of a greater crime. Petition at 9-10. The State of Washington claims "The weapon enhancement is a sentencing factor, not an element of the crime." Id. Such a contention is contrary to this Court's decisions.

The judicial determination of factors which increase a defendant's sentence implicate the Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt because such facts are elements of a greater offense. Apprendi, 530 U.S. at 490; Ring, 536 U.S. at 604, 609. The Court has gone further to explain that the facts at issue must be treated in every respect as elements of the offense. In Apprendi, the Court distinguished the term "element" from the term "sentencing factor" noting that the former refers to facts which increase the maximum penalty for an offense while the later refers to facts which set the penalty with the existing range. Apprendi, 530 U.S. at 494. The Court further explained this saying

> Apprendi and [McMillan v. Pennsylvania, 477 U.S. 79 (1986)], mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are **the elements** of the crime for purposes of the constitutional analysis.

Harris v. United States. 536 U.S. 545, 557-58 (2003) (Emphasis added); See also, Ring, 536 U.S. at 609 (aggravating circumstances that make a defendant eligible for increased punishment "operates as the functional equivalent of an element of a greater

offense"), Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) (plurality decision)("we can think of no principled reason to distinguish, between what constitutes an offense for the purposes of the Sixth Amendment's jury-trial guarantee and constitutes and 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause"). Thus it is plain that the facts used to impose a greater sentence then permitted by the jury's verdict in Mr. Recuenco's case are elements, and must be analyzed as such.

Further, the State wrongly claims the error here was merely in "misdefining a sentence enhancement." The Washington Supreme Court flatly rejected the State's effort to redefine the claimed error when it rejected the State's argument that Mr. Recuenco invited the error. The Washington Supreme Court said:

> Both the Court of Appeals and the State misinterpret the alleged error here. Recuenco did not and does not assert that the special verdict form asking the jury to find the presence of a deadly weapon was error. Indeed, he proposed that instruction because he believed and continues to believe that it was the correct instruction for the charge of second degree assault with a deadly weapon enhancement. Instead, Recuenco claims that the judge's imposition of the firearm enhancement without the jury's finding the existence of a firearm was an error violating his due process and jury trial rights.

Recuenco, 154 Wn.2d at 163-64. Nonetheless the State of Washington persists in its effort to recast the issue in this case.

Because a firearm supports both a deadly weapon finding and firearm finding, the deadly weapon finding is in effect a lesser included finding of a firearm finding. Thus, the error was not merely in misdefining a "sentencing factor." Rather, the error was in the trial court ignoring the jury's verdict to make a finding of a greater element finding based upon an undisclosed standard of proof. It is this misunderstanding of

Apprendi and this recasting of the claimed error upon which the State of Washington bases its argument.

2. The Decision of the Washington Supreme Court is consistent with this Court's decision in *Sullivan* and *Neder*.

The State of Washington maintains the decision of the Washington Supreme Court in this case and its Hughes decision are contrary to this Court's decision in Neder v. United States, 527 U.S. 1 (1999). Petition at 7-10. But no conflict exists, and the decision is wholly consistent with both Neder and Sullivan.

Neder concerned only the question of whether harmless error could apply where the jury was not charged on an element of an offense, and the judge instead found the element beyond a reasonable doubt. See Neder, 527 U.S. at 9 (noting that while trial judge removed element from jury, trial judge employed the correct standard of proof to find the element). Sullivan by contrast involved a situation where the jury returned a verdict on each element but did so without having been instructed on the proper standard of proof. Neder made clear it was not overruling Sullivan and expressly noted its holding was "consistent with the holding (if not the entire reasoning of [Sullivan]." Neder, 527 U.S. at 10.

It is only by recasting the error in this case as merely a misdefinition of an element that the State of Washington can claim that Neder is implicated. See Petition at 8-9. But, as the Washington Supreme Court recognized that is not the case. Recuenco, 154 Wn.2d at 163-64. Unlike Neder the court did not remove a single element from the jury's consideration. Instead, what the court did was to go beyond the jury's complete verdict to enter judgment against Mr. Recuenco on a greater offense.

The State of Washington's claim is akin to claiming that where a person is charged with assault and the jury fully instructed on the charge of assault but the trial judge enters a conviction of murder, the error merely lies in the failure to instruct the jury on the elements of murder. Neder plainly does not reach such a scenario.

If, as the State of Washington contends, Sullivan does not apply where a judicial finding of an element is made on less than proof beyond a reasonable doubt, the State offers no explanation of when Sullivan might apply. Because the error in this case and Hughes not only involved the denial of a jury determination but also denial of the right to have that finding made on proof beyond a reasonable doubt Neder has no application.

3. Although it did not reach the question, the Washington Supreme Court's rejection of harmless error analysis is consistent with and dictated by this Court's Double Jeopardy jurisprudence.

As explained above, because a finding which increases the maximum punishment of an offense is an element, for purposes of this case there is a continuum of three relevant degrees or level of offenses: second degree assault; second degree assault with a deadly weapon finding; and second degree assault with a firearm finding.

The Fifth Amendment provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. The Fifth Amendment's double jeopardy protection is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787 (1969).

Where a defendant is sentenced based on the jury's verdict plus a fact found by a judge, the defendant has been convicted of an aggravated version of the crime actually reflected in the jury's verdict. See e.g., Ring, 536 U.S. at 609 (aggravating circumstances that make a defendant eligible for increased punishment "operates as

the functional equivalent of an element of a greater offense"), see also Sattazahn, 537 U.S. at 111 (Plurality decision).[2] Justice Scalia's plurality decision went beyond merely restating the Ring holding: "we can think of no principled reason to distinguish, between what constitutes an offense for the purposes of the Sixth Amendment's jury-trial guarantee and constitutes and 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause." Sattazahn, 537 U.S. at 111.

Double jeopardy principles do not permit the state to seek a judgment not withstanding the verdict no matter how clear or strong the evidence of guilt. Standefer v. United States, 447 U.S. 10, 21-25 (1980). In addition, the double jeopardy principles bar any effort to uphold the greater conviction on appeal, or to permit the State to seek a verdict on the greater offense on remand. "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." Green v. United States, 355 U.S. 184, 193-94 (1957). Put simply, where jeopardy has attached to one offense by means of a conviction or acquittal, an appeal of another offense as violating double jeopardy does not allow removing the jeopardy bar which attached to the first. Benton illustrates this point.

In Benton a defendant was acquitted of larceny but convicted of burglary. 395 U.S. at 785. Because both the grand and petit juries had been selected under an

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[2] This portion of Sattazahn was only joined in by four justices, as Justice O'Connor, consistent with her dissent in Apprendi and Ring, refused to join in this section of the opinion. See 537 U.S. at 117 (O'Connor, J., concurring in part and concurring in the judgment). It is nonetheless undoubtedly an accurate statement of the law in light of Apprendi and Ring, as the four-justice dissent in Sattazahn, although disagreeing with the majority's refusal to find a jury's inability to reach a unanimous verdict on whether to impose the death penalty was the equivalent of an acquittal, specifically relied on Ring for the point that aggravating factors in death penalty cases are the equivalent of elements. Sattazahn, 537 U.S. at 126 n.6 (Ginsburg, J., dissenting).

invalid procedure, a state court set aside his burglary conviction. Id. at 786. On remand the State again sought and obtained a conviction of both burglary and the larceny of which the defendant was acquitted. Id. Before this Court, the Maryland argued that because the larceny indictment was void due to a procedural defect, no jeopardy attached and thus he could be tried again for both. Id. at 796. The Court rejected this claim finding that even if the indictment was void

> [p]etitioner was acquitted of larceny. He has, under Green a valid double jeopardy plea which he cannot be forced to waive. Yet Maryland wants the earlier acquittal set aside, over petitioner's objections, because of a defect. This it cannot do.

Benton, 395 U.S. at 797; see also United States v. Ball, 163 U.S. 662, 669-70 (1896) (concluding that even though acquittal stemmed from fatally defective indictment, the indictment was not void but merely voidable and government could not seek to set aside acquittal over defendant's objection). Because of state law questions of the interrelation of the larceny and burglary convictions, Benton remanded the matter to the state court to determine whether the burglary conviction was also barred by the jeopardy which attached to the larceny conviction. 395 U.S. at 798-99.[3]

Here a jury convicted Mr. Recuenco of second degree assault with a deadly weapon enhancement. That conviction is final, as the Washington Court of Appeals and the Washington Supreme Court have rejected all challenges to it. That final conviction now bars any conviction for a greater or lesser offense. United States v. Dixon, 509 U.S. 688, 698 (1993). Dixon explained that where a first offense results in a

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[3] Assuming that under Maryland law larceny was a lesser offense of burglary, the Court's subsequent decisions in cases dealing with lesser offenses, would require the conclusion that the burglary conviction was also barred.

conviction, and proof of a second offense necessarily proves the first, the conviction on the first will bar prosecution on the second. In Dixon, the Court found that pursuant to the Blockburger[4] test, a defendant could not be convicted of both contempt, for violating conditions of release by possessing drugs, and of the substantive offense of possession of drugs even though the defendant could commit contempt without possessing drugs, as the possessio harge was "a species of lesser-included offense." 509 U.S. at 98, citing, Illinois v. Vitale, 447 U.S. 410, 420-421 (1980) (Double Jeopardy Clause would be violated if the state's proof of manslaughter required proof of the misdemeanor crime of failure to slow to avoid accident of which the defendant has already been convicted); and Whalen v. United States, 445 U.S. 684, 694 (1980) (convictions of both rape and felony murder based on rape violated double jeopardy).

A "firearm" is by definition in Washington law a deadly weapon. Wash. Rev. Code §9.94A.602. Thus, proof sufficient to support a firearm special verdict necessarily establishes the lesser deadly weapon finding, and second degree assault with a deadly weapon finding is a "a species of lesser-included offense" of second degree assault with a firearm. Dixon, 509 U.S. at 698. Therefore, the jury's verdict on the lesser will bar any effort to seek a verdict or conviction on the greater. Id.

Because Mr. Recuenco's appeal of the conviction of the greater offense of second degree assault with a firearm does not waive his claim of former jeopardy which arises from his final conviction of second degree assault with a deadly weapon, no further action can be taken to seek or affirm the conviction of second degree assault with a firearm. See Green, 355 U.S. at 193-94; and Benton, 395 U.S. at 797. This

[4] Blockburger v. United States, 284 U.S. 299 (1932).

necessarily includes any effort to apply a harmless error analysis to affirm the conviction on appeal or any effort by the State on remand to seek a verdict on second degree assault.

Any argument that double jeopardy principles have no application here as this matter merely involves the sentence imposed miscomprehends Apprendi, Ring, and Blakely. This case is no more about sentencing than would a case where a jury convicts an individual of second degree robbery but the judge concludes the individual is guilty of first degree robbery. Apprendi, Ring, and Blakely merely make clear what is an element of a crime. Ring states any judicial finding which increases the maximum penalty is the functional equivalent of an element of a greater offense. Sattazahn establishes that elements for purposes of the Sixth Amendment are elements for purposes of double jeopardy. This case is not about sentencing at all. Instead the only question is whether a court's finding which goes beyond the jury's verdict to enter a conviction of a greater offense than that found to have been committed by the jury in its verdict can be affirmed as harmless. In short, can a reviewing court enter a judgment notwithstanding the jury's verdict. The answer is of course no.

This Court's decision in California v. Monge, 524 U.S. 721 (1998), does not require a different conclusion. Monge concluded that a reversal for sufficiency of the evidence to establish a sentencing factor – proof of a prior conviction - did not implicate double jeopardy provisions because that fact was not an element of a crime nor an "offense." In reaching this result the Court pointed to its then recent decision in Almendarez-Torres v. United States which of course held the fact of recidivism was a sentencing factor in the traditional sense and need not be pleaded and proved to a jury

beyond a reasonable doubt. Monge, 524 U.S. at 728-29 (citing inter alia Almendarez-Torres, 523 U.S. 224 (1998)). Monge stated "[Almendarez-Torres] rejected an absolute rule that an enhancement constitutes an element of the offense any time it increases the maximum sentence to which a defendant is exposed." 524 U.S. at 729. Thus, the critical point for the Court was whether the fact at issue was an element or merely a sentencing factor, and because the Court concluded the fact at issue was not an element, double jeopardy principles were not implicated.

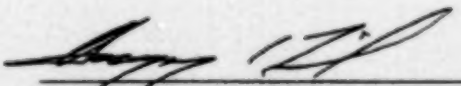
Monge only holds that double jeopardy is not implicated where sentencing factors are involved. But since that time, the Court has adopted an "absolute rule" that facts which increase the maximum penalty are elements and not merely sentencing factors. See, Apprendi, 530 U.S. at 494; Harris, 536 U.S. at 557-58; Ring, 536 U.S. at 609; Sattazahn, 537 U.S. at 111. As there is "no principled reason to distinguish between what constitutes an offense for the purposes of the Sixth Amendment's jury-trial guarantee and constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause" application of harmless error analysis to this case would violate the Double Jeopardy Clause. See e.g. Sattazahn, 537 U.S. at 111.

The decision of the Washington Supreme Court, while not reaching this issue, is nonetheless consistent with this Court's Double Jeopardy jurisprudence.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted this 11th day of August, 2005.



GREGORY C. LINK
Attorney for Respondent

CERTIFICATION OF ENROLLMENT

SENATE BILL 5477

Chapter 68, Laws of 2005

59th Legislature
2005 Regular Session

SENTENCING REFORM ACT

EFFECTIVE DATE: 4/15/05

Passed by the Senate April 14, 2005
YEAS 46 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House April 12, 2005
YEAS 96 NAYS 1

FRANK CHOPP

Speaker of the House of Representatives

Approved April 15, 2005.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 5477** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

April 15, 2005 - 5:19 p.m.

Secretary of State
State of Washington

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SENATE BILL 5477

AS AMENDED BY THE HOUSE

Passed Legislature - 2005 Regular Session

State of Washington 59th Legislature 2005 Regular Session

By Senators Kline, Brandland, Hargrove, Esser, Fairley, Kastama, Shin, Pridemore, Weinstein, Haugen, Berkey, Prentice and Rockefeller

Read first time 01/26/2005. Referred to Committee on Judiciary.

AN ACT Relating to sentencing outside the standard sentence range; amending RCW 9.94A.530 and 9.94A.535; adding a new section to chapter 9.94A RCW; creating new sections; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ... (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. The legislature intends that the sentencing court will then decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment. The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common

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law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances. The legislature does not intend to alter how mitigating facts are to be determined under the sentencing reform act, and thus intends that mitigating facts will be found by the sentencing court by a preponderance of the evidence.

While the legislature intends to bring the sentencing reform act into compliance as previously indicated, the legislature recognizes the need to restore the judicial discretion that has been limited as a result of the *Blakely* decision.

Sec. 2. RCW 9.94A.530 and 2002 c 290 s 18 are each amended to read as follows:

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for ((~~those offenses enumerated~~)) other adjustments as specified in RCW 9.94A.533((~~(4) that were committed in a state correctional facility or county jail~~)) shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to section 4 of this act. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in section 4 of this act.

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in section 4 of this act. Facts that establish the elements of a more serious crime or

additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(2) (d), (e), (g), and (h).

Sec. 3. RCW 9.94A.535 and 2003 c 267 s 4 are each amended to read as follows:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of section 4 of this act.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence ((~~unless it is imposed on an offender sentenced under RCW 9.94A.712. An exceptional sentence imposed on an offender sentenced under RCW 9.94A.712 shall be to a minimum term set by the court and a maximum term equal to the statutory maximum sentence for the offense of conviction under chapter 9A.20 RCW~~)).

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

((~~The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.~~))

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

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(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered By A Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in section 4 of this act.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance ((~~due to extreme youth, advanced age, disability, or ill health~~)).

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) ((~~The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.~~

~~(j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.~~

~~(k)~~)) The offense resulted in the pregnancy of a child victim of rape.

((~~(l)~~)) (i) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

((~~(m)~~)) (k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

((~~(n)~~)) (l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

NEW SECTION. **Sec. 4.** A new section is added to chapter 9.94A RCW to read as follows:

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(4) If the court conducts a separate proceeding to determine the existence of aggravating circumstances, the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an

aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

NEW SECTION. **Sec. 5.** (1) The sentencing guidelines commission shall review the sentencing reform act as it relates to the sentencing grid, all provisions providing for exceptional sentences both above and below the standard sentencing ranges, and judicial discretion in sentencing. As part of its review, the commission shall:

(a) Study the relevant provisions of the sentencing reform act, including the provisions in this act;

(b) Consider how to restore the judicial discretion which has been limited as a result of the *Blakely* decision;

(c) Consider the use of advisory sentencing guidelines for all or any group of crimes;

(d) Draft proposed legislation that seeks to address the limitations placed on judicial discretion in sentencing as a result of the *Blakely* decision; and

(e) Determine the fiscal impact of any proposed legislation.

(2) The commission shall submit its findings and proposed legislation to the legislature no later than December 1, 2005.

NEW SECTION. **Sec. 6.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 7.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

Passed by the Senate April 14, 2005.
Passed by the House April 12, 2005.
Approved by the Governor April 15, 2005.
Filed in Office of Secretary of State April 15, 2005.